Supreme Court, U.S.
FILED
AUG 12 2005
OFFICE OF THE CLERK

No. 04-1264

IN THE

# Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

*Petitioner,*

v.

JOHN A. CARDEGNA AND DONNA REUTER,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Florida**

## BRIEF FOR PETITIONER

AMY L. BROWN
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20044

CHRISTOPHER LANDAU
*Counsel of Record*
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

August 12, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTION PRESENTED

Whether the Florida Supreme Court erred by holding that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

## PARTIES TO THE PROCEEDING

Petitioner Buckeye Check Cashing, Inc. was respondent in the Florida Supreme Court. Respondents John A. Cardegna and Donna Reuter were petitioners in that court.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner hereby states that it has no parent corporation, and that no publicly traded company owns 10% or more of its stock.



## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i
PARTIES TO THE PROCEEDING ..... ii
TABLE OF AUTHORITIES ..... v
INTRODUCTION ..... 1
OPINIONS BELOW ..... 2
JURISDICTION ..... 3
PERTINENT STATUTORY PROVISIONS ..... 3
STATEMENT OF THE CASE ..... 4
A. Factual Background ..... 4
B. Proceedings Below ..... 6
SUMMARY OF ARGUMENT ..... 9
ARGUMENT ..... 10
The Florida Supreme Court Erred By Allowing Plaintiffs To Avoid Arbitration By Claiming That The Underlying Contract Containing An Arbitration Clause (But Not The Arbitration Clause Itself) Is Void For Illegality ..... 10
CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*,
No. 97-16751, 1998 WL 657722
(9th Cir. Sept. 3, 1998) (unpublished) ..... 2, 15
*Alabama Catalog Sales v. Harris*,
794 So. 2d 312 (Ala. 2000) ..... 15
*AT&T Techs., Inc. v. Communications Workers*,
475 U.S. 643 (1986) ..... 16
*Bell v. Cone*,
125 S. Ct. 847 (2005) (*per curiam*) ..... 18
*Bess v. Check Express*,
294 F.3d 1298 (11th Cir. 2002) ..... 2, 7, 8, 9, 15
*Booker v. Robert Half Int'l, Inc.*,
413 F.3d 77 (D.C. Cir. 2005) ..... 18
*Burden v. Check Into Cash of Ky., LLC*,
267 F.3d 483 (6th Cir. 2001) ..... 2, 9, 15
*Chastain v. Robinson-Humphrey Co.*,
957 F.2d 851 (11th Cir. 1992) ..... 14
*EEOC v. Waffle House, Inc.*,
534 U.S. 279 (2002) ..... 16
*FastFunding v. Betts*,
758 So. 2d 1143 (Fla. Dist. Ct. App. 2000) ..... 7
*First Options of Chicago, Inc. v. Kaplan*,
514 U.S. 938 (1995) ..... 16, 18, 19
*Green Tree Fin. Corp.-Ala. v. Randolph*,
531 U.S. 79 (2000) ..... 18
*Harter v. Iowa Grain Co.*,
220 F.3d 544 (7th Cir. 2000) ..... 2, 15
*In re Kinoshita & Co.*,
287 F.2d 951 (2d Cir. 1961) ..... 12
*Jenkins v. First Am. Cash Advance of Ga., LLC*,
400 F.3d 868 (11th Cir. 2005) ..... 2, 15

*John B. Goodman Ltd. P'ship v. THF Constr., Inc.*,
321 F.3d 1094 (11th Cir. 2003) ..... 20
*Lawrence v. Comprehensive Bus. Servs. Co.*,
833 F.2d 1159 (5th Cir. 1987) ..... 2, 15
*Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing v. Henley & Beckwith, Inc.*,
66 So. 2d 818 (Fla. 1953) ..... 21
*Lummus Co. v. Commonwealth Oil Ref. Co.*,
280 F.2d 915 (1st Cir. 1960) ..... 12
*Mastrobuono v. Shearson Lehman Hutton, Inc.*,
514 U.S. 52 (1995) ..... 16
*Metro East Center for Conditioning & Health v. Qwest Communications Int'l, Inc.*,
294 F.3d 924 (7th Cir. 2002) ..... 15
*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,
473 U.S. 614 (1985) ..... 16, 21
*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*,
460 U.S. 1 (1983) ..... 10, 16, 18
*National R.R. Passenger Corp. v. Consolidated Rail Corp.*,
892 F.2d 1066 (D.C. Cir. 1990) ..... 18
*Nature's 10 Jewelers v. Gunderson*,
648 N.W.2d 804 (S.D. 2002) ..... 20
*Party Yards, Inc. v. Templeton*,
751 So. 2d 121 (Fla. Dist. Ct. App. 2000) ..... 7
*Pitts v. Pastore*,
561 So. 2d 297 (Fla. Dist. Ct. App. 1990) ..... 11
*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,
388 U.S. 395 (1967) ..... 1-2, 7-8, 10-17, 19-20
*Primerica Life Ins. Co. v. Brown*,
304 F.3d 469 (5th Cir. 2002) ..... 14
*Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,
271 F.2d 402 (2d Cir. 1959),
*cert. granted*, 362 U.S. 909,
*cert. dismissed*, 364 U.S. 801 (1960) ..... 12
*Sandvik AB v. Advent Int'l Corp.*,
220 F.3d 99 (3d Cir. 2000) ..... 14



*Shearson/American Express, Inc. v. McMahon*,
482 U.S. 220 (1987) ..... 18
*Snowden v. Checkpoint Check Cashing*,
290 F.3d 631 (4th Cir. 2002) ..... 2, 9, 15
*Southland Corp. v. Keating*,
465 U.S. 1 (1984) ..... 16
*Spahr v. Secco*,
330 F.3d 1266 (10th Cir. 2003) ..... 14
*Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*,
256 F.3d 587 (7th Cir. 2001) ..... 14, 16
*Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*,
925 F.2d 1136 (9th Cir. 1991) ..... 14
*Vacation Beach, Inc. v. Charles Boyd Constr., Inc.*,
No. 5D04-4073, __ So. 2d __, 2005 WL 1704415
(Fla. Dist. Ct. App. July 22, 2005) ..... 20, 21
*Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*,
489 U.S. 468 (1989) ..... 16

**STATUTES AND RULES**

9 U.S.C. §§ 1-16 ..... 6
9 U.S.C. § 2 ..... 3
9 U.S.C. § 4 ..... 4, 12
9 U.S.C. § 10 ..... 18
28 U.S.C. § 1257(a) ..... 3
Fla. Stat. § 560.301 ..... 4
Fla. Stat. § 560.401 *et seq.* ..... 4

**OTHER AUTHORITIES**

17A C.J.S. *Contracts* (1999) ..... 11

## INTRODUCTION

Almost forty years ago, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that the Federal Arbitration Act ("FAA") does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) was fraudulently induced. Under the FAA, the *Prima Paint* Court explained, a challenge to the validity of the underlying contract is severable from a challenge to the validity of the arbitration clause. Thus, once it is clear that the parties have agreed to arbitrate their dispute, the arbitrator—not the court—must resolve any challenge to the validity of the underlying contract in the first instance.

That principle is controlling here, because respondents are challenging the validity of their underlying contracts with petitioner, but their challenge does not implicate the making of their agreement to arbitrate. Respondents neither deny that they assented to an arbitration agreement, nor challenge the arbitration agreement itself as illegal. Rather, respondents contend only that the underlying contracts are illegal as usurious. Under *Prima Paint*, that challenge must be resolved in the first instance by an arbitrator, not a court.

The Florida Supreme Court, however, attempted to distinguish *Prima Paint* on the ground that the challenge there (fraud in the inducement) would have rendered the underlying contract *voidable* under state law, whereas the challenge here (illegality) would render the underlying contracts *void* under state law. But, as Justice Cantero noted in dissent below, that is a distinction without a difference in this context. Whether the underlying contracts are alleged to be voidable or void as a matter of *state* law has nothing to do with the real issue—whether respondents' challenge to the legality of their underlying contracts implicates their assent to arbitration as a matter of *federal* law. Not surprisingly, thus, all six federal courts of appeals that have considered this issue have concluded

that a party cannot avoid arbitration under *Prima Paint* by simply challenging the underlying contract as illegal. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-82 (11th Cir. 2005); *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (4th Cir. 2002); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). As these courts recognize, *Prima Paint* establishes as a matter of *federal* law that the alleged invalidity of an underlying contract does not "taint" or otherwise prevent enforcement of an arbitration clause to which the parties concededly have assented.

Because the Florida Supreme Court majority (as the dissent below noted) "disregard[ed] controlling federal law and the federal preference for enforcing arbitration clauses," Pet. App. 26a, this case once again calls for this Court to vindicate federal arbitration rights against the very hostility that motivated the FAA in the first place. Accordingly, this Court should reverse the judgment.

## OPINIONS BELOW

The Florida Supreme Court's decision is reported at 894 So. 2d 860 (2005), and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-26a. The Florida District Court of Appeal's decision is reported at 824 So. 2d 228 (2002), and reprinted at Pet. App. 27a-32a. The Florida trial court's unreported decision denying petitioner's motion to compel arbitration is reprinted at Pet. App. 33a-34a.



## JURISDICTION

The Florida Supreme Court rendered its decision on January 20, 2005. Pet. App. 1a. Petitioner filed a timely petition for certiorari on March 21, 2005. This Court granted that petition on June 20, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act provides in pertinent part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the Federal Arbitration Act provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action … of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. … The court shall hear the parties, and upon being satisfied that the making of the agreement for

> arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner Buckeye Check Cashing, Inc. provides check-cashing and payday advance (or "deferred presentment") services in many States, including Florida. These services allow consumers to obtain immediate cash, either by cashing a third-party check or (more commonly) by writing a personal check to be cashed at some future date against anticipated income. Payday advances are typically short-term, small-dollar transactions that, for a service fee, allow consumers to deal with unanticipated cash-flow shortfalls between regularly scheduled paydays. Buckeye is licensed to do business in Florida under that State's Check Cashing and Foreign Currency Exchange Act, Fla. Stat. § 560.301, and its conduct is comprehensively regulated under the State's Deferred Presentment Act, Fla. Stat. § 560.401 *et seq*.

Respondents John A. Cardegna and Donna Reuter (collectively "plaintiffs") entered into separate deferred presentment transactions with Buckeye throughout 1999 and 2000. With each transaction, plaintiffs signed a "Deferred Deposit and Disclosure Agreement," which (among other things) documented the amount of each cash advance, detailed the service fees associated with each such advance (both as a dollar amount and as an annual percentage rate equivalent), and denoted the date on which Buckeye would seek to redeem the



personal checks plaintiffs presented at the time of their respective transactions.[1] Each of those contracts specified that "[t]he fee charge[d] for a deferred deposit transaction is a service fee and not interest." JA 35, 37, 39, 41.

Each contract also contained a broad arbitration provision, which plaintiffs were required to review and separately initial every time they conducted a transaction with Buckeye. In relevant part, those provisions state:

> 1. Arbitration Disclosure. By signing this Agreement, you agree that i[f] a dispute of any kind arises out of this Agreement or your application therefore or any instrument relating thereto, th[e]n either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below.
>
> 2. Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... *or the validity, enforceability, or scope of* this Arbitration Provision or *the entire Agreement* (collectively "Claim"), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision.... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be

[1] All told, respondent Cardegna entered into 34 transactions with Buckeye, and respondent Reuter entered into 9 such transactions, and each respondent executed a separate contract for each transaction. The wording of the relevant provisions of each contract is identical. Representative contracts were included in the record below, and are set forth in the Joint Appendix ("JA") at 35-42.

> governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law cons[istent] with the FAA and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law.

JA 36, 38, 40, 42 (emphasis added).

**B. Proceedings Below**

In February 2001, plaintiffs filed a putative class action against Buckeye in the Fifteenth Judicial Circuit of Florida. JA 12-34.[2] The complaint alleged that the fees Buckeye charged for its check cashing services were actually usurious interest rates on loans. Thus, according to plaintiffs, Buckeye was engaged in unlawful "shylocking," JA 26, and the transactions violated provisions of Florida's Lending Practices Statutes, the Florida Consumer Finance Act, the Florida Deceptive and Unfair Trade Practices Acts, and the Florida Civil Remedies for Criminal Practices Act, JA 25-32. As relief, plaintiffs sought, *inter alia*, (1) "injunctive relief against the Defendants prohibiting them from continuing to engage in the illegal conduct as alleged," (2) that "[t]he Defendants be ordered to cease their efforts to collect monies from Plaintiffs and class members," (3) that "the transactions between Plaintiffs and members of the class and Defendants be declared void and Plaintiffs and members of the class be awarded all sums paid to Defendants including but not limited to principal, double interest, and any other fees, including collection costs paid, for each and every transaction," (4) "actual damages, attorneys' fees and costs," (5) "treble damages supplemental to damages awarded under any other claim, costs and attorneys' fees," and (6) "expenses, costs, pre-judgment and post-judgment interest." JA 32-33.

---

[2] The complaint also named as a defendant, in addition to petitioner Buckeye Check Cashing, Inc., another entity named "Buckeye Check Cashing of Florida, Inc." Plaintiffs, however, never served the complaint on that entity.



Buckeye timely removed the case to federal court based on diversity of citizenship, and moved to compel arbitration and stay all proceedings. JA 6. The district court (Hurley, J.), however, remanded the case, holding that Buckeye had failed to establish that the amount in controversy exceeded the jurisdictional threshold. JA 7.

Back in state court, Buckeye again moved to compel arbitration of plaintiffs' claims and stay all proceedings. JA 2-3. After briefing and argument, the trial court (Barkdull, J.) summarily denied Buckeye's motion. Pet. App. 33a-34a. The court did not deny that plaintiffs' claims fell within the broad language of the parties' arbitration agreement, but relied on two Florida intermediate appellate decisions from another district holding that a court, not an arbitrator, must resolve a challenge to the legality of the underlying contract. Pet. App. 34a (citing *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000); *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000)).

Buckeye immediately appealed that order, and the intermediate appellate court reversed. *See* Pet. App. 27a-32a. The court noted that while plaintiffs alleged that "the underlying contract is void ab initio because it is criminally usurious and, therefore, never existed at all," Pet. App. 30a, they "did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement." Pet. App. 32a. Relying on the Eleventh Circuit's decision in *Bess* (which in turn relied on this Court's decision in *Prima Paint*), the court therefore held that the parties' arbitration agreement was enforceable and that plaintiffs' challenge to the validity of the underlying contracts must be resolved by an arbitrator, not a court, in the first instance. *See* Pet. App. 31a-32a.

Plaintiffs appealed that decision to the Florida Supreme Court, which—in a divided decision—again reversed.

Pet. App. 1a-26a. The majority held that "an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio." Pet. App. 1a. *Prima Paint* was not controlling, the majority held, because the challenge to the underlying contract there (fraud in the inducement) would have rendered the contract *voidable* under state law, whereas the challenge to the underlying contract here (illegality) would have rendered the contract *void* under state law. Pet. App. 5a-6a. The majority acknowledged that this holding was inconsistent with the Eleventh Circuit's analysis in *Bess*, but asserted that "the case presently before us is distinguishable because *Bess* was expressly resolved under federal law, not state law principles." Pet. App. 7a.

Justice Bell specially concurred to acknowledge "that the issue before us is one of federal law." Pet. App. 9a. Justice Bell proceeded, however, to "disagree with the conclusions that have been reached" by every federal appellate court to consider the issue. *Id.* While conceding that plaintiffs "do[] not dispute that [they] assented to the arbitration agreement," Justice Bell asserted that "assent alone does not make for a valid and enforceable contract." Pet. App. 12a. According to Justice Bell, "[t]he issue of the underlying contract's legality must be determined by the courts before any claim or dispute arising out of the contract may be referred to arbitration pursuant to the contract's arbitration clause." Pet. App. 12a.

Justice Cantero dissented, noting that "[t]he issue in this case is not whether a check-cashing contract is void as usurious," but "*who decides* whether the contract is void– -the arbitrator, as provided in the contract itself, or the court." Pet. App. 13a (emphasis in original). That issue, Justice Cantero explained, is one of *federal* law under *Prima Paint*. Pet. App. 14a. Justice



Cantero further noted that the void/voidable distinction on which the majority relied "is arbitrary and totally disconnected" from the language of the FAA. Pet. App. 17a. Indeed, he pointed out, "[i]n the last three years no fewer than three federal courts of appeals have decided the precise issue we confront today—whether, under the FAA, the issue of whether a check-cashing transaction is void as usurious is for the court or the arbitrator to decide," and "*[e]very one* unanimously has held that the issue is one for the arbitrators." *Id.* (referring to *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-38; and *Burden*, 267 F.3d at 489-90) (emphasis in original). Justice Cantero concluded that "[w]e should follow *Bess*, *Snowden*, and *Burden*, which considered the identical issue under identical facts and held that, under the plain language of the FAA, the issue of whether a check-cashing transaction is usurious must be determined by the arbitrators." Pet. App. 20a.

## SUMMARY OF ARGUMENT

Three straightforward points dispose of this case: (1) plaintiffs do not deny that their dispute with Buckeye falls within the broad scope of the parties' arbitration agreements, which expressly encompass challenges to "the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement," JA 35, 37, 39, 41; (2) plaintiffs do not deny that they assented to those arbitration agreements; and (3) plaintiffs do not challenge those arbitration agreements themselves (as opposed to the underlying contracts) as illegal or otherwise unenforceable. In light of these three undisputed points, the Florida Supreme Court erred by holding that the trial court was neither required nor permitted to enforce the parties' arbitration agreement.

The Florida Supreme Court based that holding on the proposition that a party can avoid arbitration by challenging the legality of the underlying contract on grounds totally unrelated to arbitration (here, alleged usury). That proposition, however,

is squarely inconsistent with federal law. As this Court explained in *Prima Paint*, the FAA establishes that a challenge to the validity of an underlying contract is severable from a challenge to the validity of an arbitration clause. The Florida court purported to distinguish *Prima Paint* on the theory that the challenge to the underlying contract there (fraud in the inducement) would have rendered the contract *voidable* under state law, whereas the challenge to the underlying contract here (illegality) would render the contract *void* under state law. Under *Prima Paint*, however, the severability issue is not governed by state law at all, but rather by federal law under the FAA. Thus, unless a party challenges its assent to arbitration, any challenge to the validity of the underlying contract (as opposed to the arbitration clause itself) must be presented in the first instance to the arbitrator. Because plaintiffs' challenge to the underlying contracts here (illegality in light of alleged usury) does not implicate their assent to arbitration, that challenge must be resolved in the first instance by an arbitrator, not a court.

## ARGUMENT

### The Florida Supreme Court Erred By Allowing Plaintiffs To Avoid Arbitration By Claiming That The Underlying Contract Containing An Arbitration Clause (But Not The Arbitration Clause Itself) Is Void For Illegality.

The Florida Supreme Court erred by holding that the FAA allows plaintiffs to avoid arbitration by claiming that their underlying contracts with Buckeye (but not the arbitration clauses of those contracts) are void for illegality. That holding contravenes this Court's seminal decision in *Prima Paint*, which established—as a matter of the "*federal* substantive law of arbitrability," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added) (discussing *Prima Paint*)—that a challenge to the validity of an underlying contract is severable from a challenge to the validity



of an arbitration clause. *See* 388 U.S. at 402-04. That principle controls this case, and requires enforcement of the parties' arbitration agreements. Plaintiffs are free to pursue their claims of illegality before the arbitrator, but cannot use those claims to avoid arbitration altogether.

The Florida Supreme Court, however, asserted that "the rationale of *Prima Paint* should not be extended to the facts of this case." Pet. App. 5a. According to that court, "[t]here is a key distinction between the claim in *Prima Paint* and the claim presently before us: in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*," whereas the claim of illegality here, if true, would render the contract "*void* from the outset" under state law. Pet. App. 5a-6a (emphasis modified). Thus, the court asserted, "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well." Pet. App. 6a; *see also id.* at 7a ("We conclude that Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract.").

The void/voidable distinction on which the Florida Supreme Court relied has no basis in the FAA. Rather, it is a *state* law distinction regarding the appropriate remedy for wrongdoing in the formation of a contract: certain wrongdoing renders the contract voidable at the election of the wronged party, whereas other wrongdoing renders the contract void ab initio. *See, e.g.*, 17A C.J.S. *Contracts* § 137 (1999). As a practical matter, that distinction means that the wronged party has the option of enforcing the contract under certain circumstances (where the contract is voidable), but that neither party has the option of enforcing the contract under other circumstances (where the contract is void ab initio). *See id.; see also Pitts v. Pastore*, 561 So. 2d 297, 300 (Fla. Dist. Ct. App. 1990).

Whether a contract is void or voidable as a matter of *state* law, however, has nothing to do with the *federal* severability analysis adopted in *Prima Paint*. Indeed, this Court granted certiorari in *Prima Paint* precisely to decide whether severability under the FAA is governed by state or federal law, an issue that previously had divided the lower courts. In particular, the Second Circuit had held that "arbitration clauses as a matter of *federal* law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed at the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402 & n.8 (emphasis added; citing, *inter alia*, *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960)). The First Circuit, in contrast, had held that "the question of 'severability' is one of *state* law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court." *Id.* at 403 & n.9 (emphasis added; citing *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923-24 (1st Cir. 1960)).

The *Prima Paint* Court squarely endorsed the Second Circuit's approach. As the Court explained, "Congress has provided an explicit answer" to the question in the FAA, *id.* at 403, which directs courts to compel arbitration where "the making of the agreement for arbitration ... is not in issue," 9 U.S.C. § 4. Where a party to such an agreement challenges the validity of the underlying contract (as opposed to the validity of the arbitration clause itself), the Court held, "the making of the agreement for arbitration ... is not in issue" as a matter of *federal* law. *See* 388 U.S. at 404 ("[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."). In other words, the FAA creates a federal rule of severability that distinguishes



between a challenge to the underlying contract and a challenge to the arbitration clause itself. Under the FAA, a court "may consider *only*" the latter challenge, *even if state law provides that the remedy for the former challenge is to nullify the entire contract, including the arbitration provision. See id.* (emphasis added). Justice Black dissented on precisely this point, noting that "[t]he Court here holds that the [FAA], *as a matter of federal substantive law*, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might ... hold the entire contract—including the arbitration agreement—*void* because of fraud in the inducement." *See id.* at 407 (dissenting opinion; emphasis added).

The lesson of *Prima Paint*, thus, is that a party cannot avoid an agreement to arbitrate unless that party challenges the making of that agreement. It follows that a court's role under the FAA is sharply limited: once it is clear that a party has assented to arbitration, any challenge to the validity of the underlying contract (as opposed to the arbitration agreement itself) must be presented in the first instance to the arbitrator. As Justice Cantero pointed out in dissent below, the relevant distinction under the FAA is between those challenges that implicate the making of an arbitration agreement and those that do not, rather than between those challenges that would render a contract void (as opposed to voidable) under state law. *See* Pet. App. 16a-17a (noting that void/voidable distinction "is arbitrary and totally disconnected from the statutory language," and that *Prima Paint* instead "distinguished between issues concerning the making of the underlying contract, which are arbitrable, and issues concerning the making of the arbitration agreement, which are not"); *see also id.* at 23a (same). It may be that some challenges that

implicate a party's assent to arbitration *also* would render a contract void under state law, but that is beside the point.[3]

The Florida Supreme Court thus erred by relying on a line of federal appellate cases that, it declared, "likewise distinguished *Prima Paint* and declined to extend its holding to instances where a party claims that a contract was void from its inception." Pet. App. 6a-7a (citing *Spahr v. Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 110 n.9 (3d Cir. 2000); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-42 (9th Cir. 1991)). Each of those cases involved a claim that the plaintiff had never assented to the underlying contract in the first place, either because of a signatory's lack of authority (*Sphere Drake*, *Sandvik*, *Chastain*, *Three Valleys*), or mental incapacity (*Spahr*). Such claims, these courts held, *do* implicate "the making of the agreement for arbitration" within the meaning of *Prima Paint*, on the theory that if a signatory did not assent to the underlying contract, then the signatory necessarily did not assent to arbitration. Assuming that all of these cases were correctly decided, *but see Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding, in direct conflict with *Spahr*, that arbitrator is to decide a mental capacity defense that does not relate specifically to the arbitration agreement), the fact remains that none of these cases involved a challenge to the underlying

[3] Indeed, this case underscores Justice Cantero's point about the arbitrariness of the void/voidable distinction in this context. Although plaintiffs allege that their contracts with Buckeye are void ab initio, their complaint also requests that "[t]he Defendants be ordered to cease their efforts to collect monies from Plaintiffs and class members," JA 33, thereby effectively treating the contracts as voidable rather than void. Given that plaintiffs seek to retain the benefits of their contracts with Buckeye, they cannot really be arguing that those contracts never existed.



contract based on illegality—which, of course, goes to the *content* of the contract, not the parties' *assent*.

To the contrary, all six federal courts of appeals to address the latter issue (the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits) have held that a party cannot avoid arbitration by simply challenging the underlying contract as illegal. *See, e.g.*, *Jenkins*, 400 F.3d at 880-82; *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-38; *Burden*, 267 F.3d at 489-90; *Harter*, 220 F.3d at 550; *3H & Assocs.*, 1998 WL 657722, at *2; *Lawrence*, 833 F.2d at 1161-62. Such a challenge, these courts have recognized, does not implicate the "making of the agreement to arbitrate" because it does not implicate "questions of assent." *Bess*, 294 F.3d at 1305; *see also Jenkins*, 400 F.3d at 882 ("[The plaintiff] argues that the payday loan contracts are void, not because she failed to assent to the terms of the contracts, but because those terms render the contracts usurious and void under Georgia law."); *Snowden*, 290 F.3d at 637 ("[The plaintiff's] allegations of usurious rates of interest and non-licensure do not relate specifically to the Arbitration Agreement [nor do] they underlie a claim that [the plaintiff] failed to assent to the terms of the ... Agreement."); *Burden*, 267 F.3d at 490 (challenges based on alleged illegality of underlying contracts "do not concern [a] failure to assent"); *see also Metro East Center for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) ("Many decisions, of which *Prima Paint* ... is the leading example, hold that defenses to performance—even those that logically defeat arbitration—belong to the arbitrator as long as there is no doubt that the parties agreed to arbitrate."); *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 320 (Ala. 2000) (Lyons, J., dissenting) ("[The plaintiff's] contention that the contract is invalid is not grounded on a claim of want of assent, but rather on a claim of unenforceability notwithstanding assent."). Once it is clear that the parties agreed to arbitrate their dispute, any challenge to the legality of the underlying

contract must be resolved by the arbitrator, not the court, in the first instance.

Put another way, the general rule laid down by *Prima Paint* is that challenges directed at the underlying contract go to the arbitrator, while challenges directed at the arbitration clause go to the court. That general rule is subject to two qualifications, neither of which applies here. *First*, a challenge directed at the underlying contract goes to the court if it implicates the parties' assent, because a party that did not assent to the underlying contract by definition did not assent to an embedded arbitration clause. *See, e.g.*, *Sphere Drake*, 256 F.3d at 590-91. *Second*, and conversely, a challenge directed at the arbitration clause goes to the arbitrator if the parties "clearly and unmistakably" agreed to submit such disputes to arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-47 (1995). The existence of these two qualifications, however, in no way negates the validity or force of the general rule.

That rule also makes sense, and comports with "the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. As this Court has stated time and again, "[a]rbitration under the FAA is a matter of consent." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (brackets omitted; quoting *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)); *see also First Options*, 514 U.S. at 943; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Where, as here, the parties have agreed to arbitrate a particular dispute and do not challenge either that agreement itself or their assent to the underlying contract, the FAA requires a court to enforce the arbitration agreement forthwith. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) ("In enacting § 2 of the



[FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties *agreed* to resolve by arbitration.") (emphasis added). Because the validity of the agreement to arbitrate is distinct as a matter of federal law from the validity of the underlying contract between the parties, *see Prima Paint*, 388 U.S. at 402-04, a party cannot vitiate its assent to arbitration by simply challenging the validity of the underlying contract.

For this reason, the Florida Supreme Court's assertion that "Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract," Pet. App. 7a, misses the mark. Because the FAA renders an arbitration agreement legally severable from the underlying contract in which it is embedded, a court is not "breathing life" into the underlying contract by enforcing the arbitration agreement. Whether the underlying contract is good, bad, or indifferent is of no legitimate concern to the court. If the parties agreed to arbitrate their dispute, and do not challenge either the arbitration agreement itself or their assent to the underlying contract, that is the end of the matter as far as the court is concerned. *See Prima Paint*, 388 U.S. at 404. By enforcing the agreement to arbitrate, in other words, a court in no way places its imprimatur on the underlying contract (as opposed to the arbitration agreement); it simply is deciding that a dispute over that contract must be resolved in a different forum.

Indeed, as Justice Cantero pointed out in dissent below, the Florida Supreme Court's contrary approach reflects the very hostility to arbitration that the FAA was adopted to counteract. *See* Pet. App. 26a ("[T]he majority opinion evince[s] a basic distrust of arbitration [by] plac[ing] the court as jealous guardian of the determination of legal issues."). Arbitrators, no less than courts, are perfectly capable of following the law and

determining whether an underlying contract is illegal. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987). Thus, just as federal courts must presume that state courts "know and follow the law," *Bell v. Cone*, 125 S. Ct. 847, 853 (2005) (*per curiam*) (internal quotation omitted), *both* federal and state courts must presume that arbitrators also know and apply the law. Indeed, the "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24-25, requires (and presumes) no less. If the arbitrators were to exceed their authority, or otherwise manifestly disregard the law, then a court could always vacate their decision. *See* 9 U.S.C. § 10; *First Options*, 514 U.S. at 942; *cf. National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1071 (D.C. Cir. 1990) ("If the arbitrator construes the contract so as to require someone to commit an illegal act, a court can then refuse to enforce the arbitrator's decision."). But speculation about that possibility provides no basis for refusing to enforce the arbitration agreement in the first place. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 80-83 (D.C. Cir. 2005) (Roberts, J.).

It is no answer to say, as did the special concurrence below, that enforcing an arbitration agreement when the underlying contract is potentially illegal under state law "treat[s] arbitration clauses as a class of 'super' clauses, immune from a state's otherwise generally applicable contract law." Pet. App. 11a (Bell, J., specially concurring). As Justice Cantero explained, the FAA "treat[s] arbitration clauses not as a class of 'super' clauses, but as a class of *separate* clauses—separate, that is, from the other clauses in a contract." Pet. App. 20a (dissenting opinion; emphasis in original). Thus, arbitration clauses are not treated *differently* than other clauses, but "simply evaluated *independently* of the rest of the contract under the state's otherwise generally applicable contract law." *Id.* (emphasis in original; internal quotation omitted). To the extent that parties



challenge an arbitration agreement itself, or their assent to the underlying contract, and the parties have not clearly and unmistakably vested authority over such a challenge in the arbitrator, *see, e.g., First Options*, 514 U.S. at 943-45, a court will resolve that challenge under ordinary state contract law. Unless parties challenge the arbitration agreement itself or their assent to the underlying contract, however, any other challenge to the underlying contract must be referred to arbitration, where it also will be resolved under ordinary principles of state contract law.

Thus, the *only* principle of state contract law that is overridden by federal law under this approach is state severability law, to the extent it would treat a challenge to an arbitration agreement as inseverable from a challenge to the underlying contract. But the precise holding of *Prima Paint* is that the FAA governs this severability inquiry as a matter of federal substantive law. *See* 388 U.S. at 402-04 (endorsing the Second Circuit's approach that severability is a matter of federal law under the FAA, and rejecting the First Circuit's contrary approach). The Florida Supreme Court squarely contravened that holding by asserting that "there are no severable, or salvageable, parts of a contract found illegal and void under Florida law." Pet. App. 8a. *Prima Paint* has stood the test of time for almost four decades, during which time innumerable arbitration agreements have been executed, and there is no reason for this Court to revisit its holding now.

Indeed, as Justice Bell conceded (with some understatement) below, the Florida Supreme Court's contrary approach creates "a somewhat troubling 'circularity'": "we do not yet know if the check-cashing transactions are illegal under Florida law, so we do not know if the contract here really was void ab initio." Pet. App. 12a n.1 (specially concurring opinion). Justice Bell attempted to blunt the force of that concession by asserting that the alternative approach was equally circular: "if the arbitrator

were to conclude that the contracts were illegal and unenforceable, we then would have enforced an unenforceable contract." *Id.* That assertion, as explained above, is inaccurate: *Prima Paint* breaks the circle by severing the validity of the arbitration agreement from the validity of the underlying contract. Thus, even if the arbitrator were to find the underlying contract invalid, that invalidity would in no way "taint" the validity of the arbitration clause, or retroactively (and self-defeatingly) nullify the arbitrator's authority.

As a practical matter, moreover, the implications of the Florida Supreme Court's contrary approach are breathtaking. If a court were to decide the legality of the underlying contract in the course of deciding whether the dispute was arbitrable, there would be nothing left for the arbitrator to decide on the merits: the court effectively would have usurped the arbitrator's role. Thus, parties always could avoid arbitration by simply challenging some provision of the underlying contract as illegal. In this highly regulated day and age, virtually *all* contracts—from construction contracts to franchise agreements—can be (and have been) challenged as illegal and hence potentially void ab initio under state law. *See, e.g., John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1096-97 (11th Cir. 2003); *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804, 805 (S.D. 2002). The Florida Supreme Court's approach would thus effectively emasculate arbitration agreements by allowing plaintiffs to avoid such agreements at will by challenging the underlying contract as illegal on any ground.

Indeed, a Florida intermediate appellate court recently relied on the decision below in refusing to enforce an arbitration clause where the underlying contract was alleged to violate "public policy." *See Vacation Beach, Inc. v. Charles Boyd Constr., Inc.*, No. 5D04-4073, __ So. 2d __, 2005 WL 1704415, at *3 (Fla. Dist. Ct. App. July 22, 2005) ("[We] hold … that the



threshold challenge to the contract containing an arbitration provision based on the contract's illegality *or violation of public policy* must first be resolved by the trial court.") (emphasis added). That approach follows from the Florida Supreme Court's decision in this case, the court declared, because "[c]ontracts transgressing public policy … are considered to be illegal and will not generally be enforced by the courts." *Id.*; *see also Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 823 (Fla. 1953) ("Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties."). Needless to say, that approach would render arbitration a dead letter, since virtually any allegation of wrongdoing can be said to implicate a violation of "public policy." Thus, the opinion below effectively gives courts a license to ignore arbitration agreements at will.

In the final analysis, the Florida Supreme Court's approach turns the FAA upside down by *nullifying*, rather than *enforcing*, arbitration agreements. In unequivocal terms, the parties here agreed to arbitrate "any claim, dispute, or controversy … arising from or relating to … *the validity, enforceability, or scope of … the entire Agreement*." JA 36, 38, 40, 42 (emphasis added). By refusing to enforce arbitration of such a dispute, on the ground that the parties' underlying contracts might violate state usury laws, the Florida Supreme Court violated "[t]he liberal federal policy favoring arbitration agreements manifested by … the [FAA]." *Mitsubishi Motors*, 473 U.S. at 625 (internal quotation omitted). That policy, after all, "is at bottom a policy guaranteeing the enforcement of private contractual arrangements," and "as with any other contract, the parties' intentions control." *Id.* at 625-26. Needless to say, a court does not "rigorously enforce agreements to arbitrate," *id.* at 626 (internal quotation omitted), by expressly overriding the plain terms of the parties' arbitration agreement.

At bottom, this is a straightforward case. Plaintiffs do not deny that their dispute with Buckeye falls within the plain scope of their arbitration agreements. Nor do plaintiffs deny that they assented to those agreements. *See, e.g.*, Pet. App. 12a ("Cardegna does not dispute that he assented to the arbitration agreement.") (Bell, J., specially concurring); Pet. App. 32a ("Here, appellees did not argue that they did not enter into the arbitration agreement."). Nor do plaintiffs challenge any provision of the arbitration agreements themselves (as opposed to the underlying contracts) as illegal or otherwise unenforceable. *See, e.g.*, Pet. App. 10a ("It is also important to note that Cardegna does not claim that the arbitration clause itself (separately, as opposed to the contract as a whole) somehow is invalid.") (Bell, J., specially concurring); Pet. App. 28a ("[A]t the hearing before the trial court, [plaintiffs] did not argue that the arbitration provision was unconscionable. Accordingly, the issue of unconscionability is not properly before this court for review."). Under the FAA, these three points are dispositive, and a court must enforce the parties' arbitration agreements.

## CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

AMY L. BROWN
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20044

CHRISTOPHER LANDAU
*Counsel of Record*
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

August 12, 2005